JUN 11 1951

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 111

JACKSONVILLE GAS CORPORATION, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA,

Petitioner,

vs.

FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND BRIEF IN SUPPORT THEREOF.

ELLIOTT ADAMS,
423 Atlantic National Bank Building,
Jacksonville, Florida,
Counsel for Petitioner.

MCCARTHY, LANE & ADAMS,
423 Atlantic National Bank Building,
Jacksonville, Florida,
Of Counsel.

INDEX

	Page
Petition for Writ of Certiorari	
I. Summary Statement of the Matter Involved	1
II. Jurisdictional Statement	2
III. Questions Presented	3
First Question	4
Second Question	4
Third Question	4
IV. Reasons Relied on for the Allowance of the Writ	4
Brief in support of Petition for Writ of Certiorari	7
Opinion of Court Below	7
Jurisdiction	7
Statement of the Case	7
Specifications of Error	8
Argument:	
First Specification	8
Second Specification	14
Third Specification	16
Conclusion	18

AUTHORITIES CITED

Matthews v. *State, ex rel. St. Andrews Bay Transportation Company,* 111 Fla. 587, 149 So. 648	11
West Ohio Gas Co. v. *Public Utilities Commission of Ohio,* 294 U. S. 79, 79 L. ed. 773	11
Northern States Power Co. v. *Public Service Commission* (N.D.), 13 N.W. 2d 779	13
Northern Pacific Railway Company v. *Department of Public Works of Washington* (1925), 268 U. S. 39, 69 L. ed. 836	13

Page

Chicago Junction Case (*Baltimore & O. R. Co.* v. *United States*), 264 U. S. 258, 68 L. ed. 667, 673, 44 S. Ct. 317 13

I.C.C. v. *Union P. R. Co.*, 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 S. Ct. 108 13

Wisconsin Telephone Co. v. *Public Service Commission*, 232 Wis. 274, 287 N. W. 122, 136 14

STATUTES

Ch. 8974, Laws of Florida, Acts of 1921 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 111

JACKSONVILLE GAS CORPORATION, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA, *Petitioner,*

vs.

FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the decision and order (R. 126-136) of the Supreme Court of Florida entered in the above entitled cause on January 5, 1951, denying petition for writ of certiorari to the order (R. 113-118) of Florida Railroad and Public Utilities Commission entered the 29th day of March, 1950. A peti-

tion for rehearing was filed (R. 136) and denied by the Supreme Court of Florida on March 14th (R. 143).

I

Summary Statement of the Matter Involved

This is a proceeding to fix rates to be charged by petitioner for the sale of manufactured gas. It originated in a resolution by the City Commission of the City of Jacksonville, adopted October 14, 1948, effective January 1, 1949 (R. 1). Operation of this resolution was enjoined by the United States District Court for the Southern District of Florida pending a judicial determination of proper rates (R. 4). An appeal from the rate resolution of the City of Jacksonville was taken to the Florida Railroad and Public Utilities Commission which heard the case *de novo* (R. 5).

Order of the Florida Railroad and Public Utilities Commission of December 2, 1949, fixed the petitioner's rate base as the actual cost depreciated—$2,973,903.60 (R. 30), and allowed a return thereon of 7% (R. 31). The Utilities Commission further fixed definitive rates designed to give petitioner a return of 7% on its rate base (R. 40). These rates were predicated on estimates of gas sales for 1949 (R. 22), and on estimates of expenses for 1949 (R. 33).

Such order of December 2, 1949, was retroactive to January 1, 1949 (R. 32), leaving petitioner to make refund to customers of all sums collected by it in excess of such rates.

At the time of the entry of that order, actual experience made it apparent that the Utilities Commission's estimates of gas sales for 1949 and estimates of expenses for 1949 were erroneous. On rehearing granted by such Commission (R. 43-45), undisputed evidence was received showing that the Utilities Commission *over*estimated 1949 gas sales

by 50,719,500 cubic feet (R. 62), and *under*estimated expenses for 1949 by:

1) $22,356.91, cost of fuels
2) 19,599.77, taxes, other than income
3) 6,100.00, rate case expense
4) 2,057.42, actual depreciation expense

$50,144.10, Total annual expense to petitioner excluded from the Utilities Commission's estimate (R. 137).

The Utilities Commission refused to consider such actual experience of petitioner's sales and expenses for 1949 and adhered to its order fixing definitive rates to be charged for gas for 1949 and future years, predicated on its erroneous estimates of sales and expenses (R. 117-118).

The Utilities Commission gave as a reason for such refusal: "Had the gas company charged throughout the year 1949 the rates and charges fixed by the Commission the gas sales undoubtedly would have been considerably higher" (R. 117).

On petition for writ of certiorari, the Supreme Court of Florida declined to consider the matter, saying ". . . we do not think it necessary to grant the petition and quash the order, with directions to reconsider the matter, but shall leave it for such consideration as future rate-making bodies shall see fit to give it when next the determination of rates reaches them" (R. 136, 143).

II

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because the refusal of the Utilities Commission to consider material facts substantially affecting the issue is a denial of due process of

law; and the imposition of rates, not based on the evidence, which fail to give a fair return on the value of petitioner's property constitutes a taking of property without compensation, all in violation of the 14th Amendment to the Constitution of the United States, and, by the refusal of the Supreme Court of Florida to grant certiorari, said Court has decided a Federal question of substance in a way not in accord with the applicable decisions of this Court.

III

Questions Presented

1. Should the Florida Supreme Court have granted certiorari to the rate order of the Utilities Commission, which order, although retroactive, was based upon estimates and forecasts shown by undisputed evidence of actual experience to be erroneous?

2. Should the Florida Supreme Court have granted certiorari to said rate order, which order was based upon the arbitrary and purely speculative assumption, without evidentiary support, that lower rates "undoubtedly would have" resulted in increased gas sales?

3. Should the Florida Supreme Court have granted certiorari to said rate order, which order was retroactive and provided rates that are shown by undisputed evidence to be inadequate to afford petitioner a compensatory return on its rate base?

We contend that each of the foregoing questions should be answered in the affirmative.

IV

Reasons Relied On for the Allowance of the Writ

Petitioner's present rates produce a fair revenue, adequate to cover the expenses above mentioned and to give

petitioner a return on its rate base very close to the sum found by the Utilities Commission to be reasonable. So close, in fact ($12,618.23 on a gross revenue of $1,348,549.00 for the calendar year 1949 (R. 111)), that any one of the many imponderable factors affecting petitioner's business such as weather, fuel, prices, taxes, labor costs, and policies of competitors, might affect a year's earnings by more than that amount. For instance, revenue for January, 1950, was $19,286.71 less than for January, 1949 (R. 69).

Application of the rates ordered by the Utilities Commission would result in a substantial loss to the petitioner. Based on the amount of gas sold by petitioner in 1949, and the costs and expenses then prevailing, petitioner's net revenue would be $166,095.53, or $42,077.72 less than the $208,173.25 which the Utilities Commission found to be a reasonable earning (R. 68).

The rates which petitioner has had in effect have given it appropriate revenue to cover its actual expenses and to provide earnings no more than found by the Commission to be reasonable. Failure of the Court to pass upon and decide this issue will cause petitioner irreparable injury. The loss that petitioner will sustain while the Commission-ordered rates are in effect can never be recovered no matter what "consideration . . . future rate making bodies shall see fit to give" to the question. Failure of the Court to pass upon and decide this issue will require petitioner to make refund to its customers at great expense and refund that money from its reasonable earnings; further, petitioner will immediately be forced to institute proceedings to raise its rates to comprehend the increased expenses above referred to. On the other hand, if the Court should grant the writ of certiorari herein, quash the orders and decision of the Supreme Court of Florida and direct the matter to be remanded to the Florida Railroad and Public

Utilities Commission for the consideration of petitioner's actual experience for the years 1949 and 1950 of revenues and expenses, the Court will have granted the petitioner an immediate and effective remedy and will have put an end to this controversy.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Florida, commanding said Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of the proceedings in the case of Jacksonville Gas Corporation, petitioner, versus Florida Railroad and Public Utilities Commission, respondent, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States, and that the judgment herein of the Supreme Court of Florida be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated this 31st day of May, A. D. 1951.

ELLIOTT ADAMS,
423 Atlantic National Bank Building,
Jacksonville, Florida,
Counsel for Petitioner.

McCARTHY, LANE & ADAMS,
423 Atlantic National Bank Building,
Jacksonville, Florida,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

JACKSONVILLE GAS CORPORATION, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA, *Petitioner,*

vs.

FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The opinion in the Supreme Court of Florida is not yet reported.

Jurisdiction

1. The date of the judgment to be reviewed is March 14, 1951.

2. Other bases to sustain the jurisdiction of this Court are stated in the foregoing petition for certiorari (pp. 3-4).

Statement of the Case

This has already been stated in the preceding petition under I, *Summary Statement of the Matter Involved* (pp. 2-3) which is hereby adopted and made a part of this brief.

Specifications of Error

1. The Supreme Court of Florida erred when it refused to grant certiorari to the rate order of the Florida Railroad and Public Utilities Commission based on erroneous estimates and forecasts, despite a full and unchallenged showing of actual experience establishing without contradiction the manifest errors in such estimates and forecasts.

2. The Supreme Court of Florida erred by refusing certiorari to the rate order of the Florida Railroad and Public Utilities Commission based upon the arbitrary assumption, without evidentiary support, that the employment by petitioner of lower rates "undoubtedly would have" increased gas sales to the extent that such lower rates might have become compensatory.

3. The Supreme Court of Florida erred in denying certiorari to the order of the Florida Railroad and Public Utilities Commission fixing rates to be charged for gas for a time that was past that would fail to provide petitioner a compensatory return on its rate base.

Argument

1. *The Supreme Court of Florida erred when it refused to grant certiorari to the rate order of the Florida Railroad and Public Utilities Commission based on erroneous estimates and forecasts, despite a full and unchallenged showing of actual experience establishing without contradiction the manifest errors in such estimates and forecasts.*

As not infrequently happens in rate regulation proceedings, in this case, by the time the rates were fixed, much of the time for which they were to apply had already passed.

Sometimes, in a rate case, rates must be based entirely on estimates and prophecies of conditions which will prevail in the future. But in the present case, the actual facts

and figures, for more than half of the affected time, were available prior to the close of the proceedings.

The proceedings before the Florida Railroad and Public Utilities Commission were had pursuant to the provisions of Chapter 8974, Laws of Florida, Acts of 1921. This statute, among other things, provides that rates and regulations which may be fixed under authority of that act "shall continue in force and effect continuously for a period of not less than *two years* from the date that said rate, rule or regulation may be fixed, made or prescribed. . . ."

The Commission's Order No. 1571, of December 2, 1949 (R. 1-40), fixed rates to be charged for gas in the City of Jacksonville, commencing as of January 1, 1949, and before the expiration of the time within which the Commission reserved jurisdiction of the cause (30 days from December 2, 1949), one-half of the time for which the rates had been fixed had passed.

In making its rate order, the Commission considered the Company's experience for 1948, and made such adjustments as the Commission thought appropriate in the light of partial 1949 experience; and (1) estimated the volume of sales, (2) estimated production expense, (3) estimated depreciation expense, (4) estimated taxes, (5) added the 7% return on the depreciated investment or original dollar cost of Petitioner's property, and (6) stated an estimated total revenue necessary to the Petitioner of $1,323,471.23. (See Appendix 1 to Order No. 1571 of December 2, 1949.) (R. 33).

The Commission then determined a detailed schedule of rates (see Appendix 8 to the Commission's Order) (R. 40) which it estimated would produce the requisite revenue, assuming that its estimates referred to in the preceding paragraph were correct.

The validity of the Order of the Commission fixing the detailed rates is dependent upon the substantial accuracy

of the several estimated factors employed by the Commission.

On rehearing granted by the Commission (Order No. 1577 of December 30, 1949) (R. 43-45), Petitioner established, by uncontradicted evidence, substantial error in the estimates of the Commission in the following particulars:

(a) The Commission estimated the volume of gas sales for 1949 to be 913,572,000 c. f. The actual gas sales for 1949 were 862,852,500 c. f., a deficiency of 50,719,500 c. f. (R. 62).

(b) The Commission's estimate of the cost of fuels for the production of gas for 1949 was $22,356.91 less than the actual cost (R. 137).

(c) Taxes, other than income taxes, paid by the Company for 1949 were $165,365.28. The Commission estimated such taxes at $145,765.51. The deficiency in the Commission's estimate is $19,599.77 (R. 61, 111).

(d) The actual rate case expense to the Company in 1949 exceeded the Commission's estimate by $6,100.00 (R. 137).

(e) Actual depreciation expense for 1949 exceeded the Commission's estimate by $2,057.42 (R. 61).

The actual earnings of the Company in 1949, *with its present rates in effect,* were $1,348,549.11, $12,618.23 (R. 61, 111) or approximately .94% greater than the revenue necessary to the Company to provide a fair return on its original dollar cost, a percentage so small that any variable element might wipe it out. And January, 1950 did wipe it out (R. 68).

At the time of the rehearing, February 8th and 9th, 1950, the Company had available data on the volume of sales for the month of January, 1950, which were approximately 13,000,000 c. f. less than for January of 1949 (R. 69). This represents a gross revenue loss to the Company of approximately $19,286.71 (R. 69).

The Company does not contend that the gas sales of January, 1950, are necessarily indicative of Januarys in the future. However, it does illustrate that, *in one month,* unforeseeable contingencies did cause a loss of revenue greater than the so-called excess earnings for the entire year 1949. The rates charged by the Company for gas in 1949 provide only a bare margin of safety if the Company is to be permitted to earn the 7% return on its original dollar cost, as allowed by the Commission.

This evidence as to the errors in the estimates and prophecies made by the Commission was received by the Commission, on rehearing, pursuant to authority of *Matthews* v. *State, ex rel, St. Andrews Bay Transportation Company,* 111 Fla. 587, 149 So. 648, in which this Court said, text 649:

> "An order of the Railroad Commission . . . while quasi-judicial in character, is not res adjudicata of another application of exactly the same nature subsequently filed. Every promulgated order of an administrative tribunal, such as the Railroad Commission, may be superseded by another order. Likewise, the Commission has power to modify, and, indeed, *it is its duty to modify, its pre-existing orders, when new evidence is presented which warrants a change.* And so it is that the Commission is possessed of power, inherent in the nature of the administrative functions it is required to perform under the statute, to grant a rehearing of its decision in appropriate cases."

The Commission received the evidence, but declined to give it effect. This was the exercise of arbitrary judgment, and the denial of due process of law. The Supreme Court of the United States has decided this precise point in West Ohio Gas Co. v. *Public Utilities Commission of Ohio,* 294 U. S. 79, 79 L. ed 773. In the *West Ohio* case, as in the case at bar, at the date the order was rendered fixing de-

tailed rates, a substantial part of the time for which the rates were to be effective had passed. On rehearing, full and unchallenged evidence as to the actual revenue and expenses for the lapsed time was submitted to the Commission. The Commission refused to give any heed to that evidence in fixing the new rates, and the Supreme Court of Ohio affirmed. But the Supreme Court of the United States *reversed the Commission, and the Supreme Court of Ohio,* saying:

> "We think the adoption of a single year as an exclusive test or standard imposed upon the company an *arbitrary restriction in contravention of the Fourteenth Amendment* and of 'the rudiments of fair play' made necessary thereby. . . . *The earnings of the later years were exhibited in the record and told their own tale as to the possibilities of profit. To shut one's eyes to them altogether,* to exclude them from the reckoning, *is as much arbitrary action as to build a schedule upon guesswork with evidence available.* There are times, to be sure, when resort to prophecy becomes inevitable in default of methods more precise. At such times, 'an honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances', . . . is the only organon at hand, and hence the only one to be employed in order to make the hearing fair. *But prophecy, however honest, is generally a poor substitute for experience. 'Estimates for tomorrow cannot ignore prices of today.'* . . . We have said of an attempt by a utility to give prophecy the first place and experience the second that *'elaborate calculations which are at war with realities are of no avail'* . . . We say the same of a like attempt by officers of government prescribing rates to be effective in years when experience has spoken. A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment."

The action of the Florida Railroad and Public Utilities Commission in refusing to modify its original rate order, when evidence as to the actual experience of one of the two years was presented to it, was likewise in contravention of the Fourteenth Amendment.

Experience was substituted for prophecy in *Northern States Power Co.* v. *Public Service Commission* (N. D.) 13 NW 2d 779. In that case three years (1938, 1939 and 1940, which were the years in which the rates to be fixed were to apply), had passed before the case was determined. The Commission adopted the actual experience, and abandoned its estimates based on prophecy.

This was approved by the Court.

The findings of the Commission in its Order No. 1571, of December 2, 1949, are not supported by the evidence of the Company's revenue and expenses for the year 1949.

In *Northern Pacific Railway Company* v. *Department of Public Works of Washington* (1925), 268 U.S. 39, 69 L. ed. 836, 841, the Supreme Court of the United States, in an opinion by Mr. Justice Brandeis, said:

> ". . . Where rates found by a regulatory body to be compensatory are attacked as being confiscatory, *courts may inquire into the method by which its conclusion was reached. An order based upon a finding made without evidence* (Chicago Junction Case (Baltimore & O. R. Co. v. United States) 264 U. S. 258, 263, 68 L. ed. 667, 673, 44 S. Ct. 317), *or upon a finding made upon evidence which clearly does not support it* (I. C. C. v. Union P. R. Co., 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 S. Ct. 108) *is an arbitrary act against which courts afford relief.* The error under discussion was of this character. *It was a denial of due process.*"

This decision is cited with approval and followed in *Wisconsin Telephone Co.* v. *Public Service Commission,* 232 Wis. 274, 287 N.W. 122, 136.

Order No. 1595 of the Commission, confirming the previous Order No. 1571 fixing rates to be charged by the Company, comes clearly within the rule above stated. That Order is based upon findings made upon evidence which clearly does not support the findings. It is an arbitrary act. It is a denial of due process.

The Commission erred:

(1) in basing its rate order on estimates and prophecies when experience had spoken; and

(2) In refusing to consider the unchallenged showing of actual experience of the Company's revenue and expenses for the year 1949.

The Supreme Court of Florida erred in denying certiorari to the Utilities Commission's rate order.

2. *The Supreme Court of Florida erred by refusing certiorari to the rate order of the Florida Railroad and Public Utilities Commission based upon the arbitrary assumption, without evidentiary support, that the employment by petitioner of lower rates "undoubtedly would have" increased gas sales to the extent that such lower rates might have become compensatory.*

In affirming its original rate order, and in refusing to consider the evidence of the Utilities Commission's errors on rehearing, the Utilities Commission say: "Had the gas company charged throughout the year 1949 the rates and charges fixed by the Commission, the gas sales *undoubtedly* would have been considerably higher.

"The rates and charges fixed by the Commission for application by the Jacksonville Gas Company have never been put into effect by the gas company. There is no actual experience available as to the results which would obtain were these rates put into effect."

There is no basis in the record for assuming that lower rates would produce greater sales. The only evidence in the record is flatly to the contrary. Witness Duguid, in response to the question: "What effect do you think the lower rate would have on your send out?" replied (R. 79), "I don't think it would affect the send out at all. The customers are not dissatisfied with the rate and I don't think the rate would affect it."

In the *West Ohio Gas Company* case, *supra,* the Commission assumed that lower rates would produce greater revenue. The Court said:

> "We are not unmindful of the argument urged by counsel for the Commission that the effect of lower prices may be to swell the volume of the business, and by thus increasing revenues enhance the ultimate return. Upon the record as it comes to us, *this is guesswork, and no more.* There has been no attempt to measure the possible enhancement by appeal to the experience of other companies similarly situated or by any other line of proof. *Present confiscation is not atoned for by merely holding out the hope of a better life to come.*"

The Utilities Commission erred in fixing lower rates on the assumption that sales undoubtedly would have been higher, and that lower rates would thus become compensatory. The evidence is to the contrary. The taking without compensation is present confiscation. It is not justified by the prophecy that such confiscation will be diminished in the future.

3. *The Supreme Court erred in denying certiorari to the order of the Florida Railroad and Public Utilities Commission fixing rates to be charged for gas for a time that was past that would fail to provide petitioner a compensatory return on its rate base.*

The Utilities Commission fully comprehended the importance of the rate of return. In its order No. 1571, of December 2, 1949, it summarized the question and the requirements of petitioner:

> "The determination of a fair and reasonable rate of return is perhaps the most important and complex problem in this proceeding. Essential factors entering into such a determination are the general economic conditions, the necessity and ability of the Utility to attract capital, the current cost of money, the financial history of the Utility, the risk involved, comparisons with other enterprises of a similar nature, and efficiency of management. When investing in a business dedicated to public service, however, one must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends, but that his obligation limits him to only a fair and reasonable profit. An unvarying rate of return cannot be adopted for all utilities under the jurisdiction of the Commission, but the amount of the return should vary according to the particular circumstances as developed in the case under review and may change from year to year as the conditions change. A rate of return is generally considered adequate when it will attract capital to an enterprise, or, in other words, the revenue received will pay operating expenses, depreciation, taxes, interest on borrowed capital, reasonable dividends and leave an adequate balance for surplus.
>
> "The evidence of record in this proceeding shows that the Jacksonville Gas Company does not have a monopoly, but on the other hand that it is in direct competition, in so far as the small consumers of gas

are concerned, with not only the city owned and operated electric light plant, but also with butane gas dealers and with kerosene and oil for heating purposes.

Then, too, the gas company is faced with the ever increasing possibility that natural gas will be piped into the locality which it serves. Taking these matters into consideration it is apparent that the gas company's business is attended by considerably more financial risk than many other forms of utilities serving the public.

• • • • • • •

"Giving full consideration to the many factors involved, it is our opinion that rates which will yield a rate of return of 7% on the rate base hereinbefore approved will be sufficient, under present conditions and for a reasonable time in the future, to maintain the gas company's credit, and, at the same time, be fair and reasonable." (R. 20, 21).

The year 1949 is a time for which the Utilities Commission fixed the definitive rates, and those rates do not provide 7% on the rate base for that year. Based on the amount of gas sold by petitioner in 1949, and the costs and expenses then prevailing, petitioner's net revenue would have been $166,095.53, or $42,077.72 less than the $208,173.25 which the Utilities Commission found to be sufficient.

Obviously, net revenue of $166,095.53 by the standards determined by the Utilities Commission is not sufficient. On a rate base of $2,973,903.60, revenue of $166,095.53 makes a rate of return of approximately 5.5%, not 7%, and leaves a deficiency of about 1.5%. The 5.5% return is not compensatory. A similar deficiency was disclosed in the *West Ohio Gas Company* case, 294 U.S. 79, 81, 79 L. ed. 773, 776. In that case the Commission undertook to fix rates to enable the gas company to receive a return of 6% upon the value of its property. The rates in fact produced returns of 4.92%,

4.23% and 3.68% for the years 1929, 1930 and 1931 respectively, for an average deficiency of 1.72% per annum. The court found this return to be not compensatory, amounting to confiscation of the company's property.

Petitioner agrees that 7% is a "fair and reasonable" rate of return. However, petitioner maintains that a return of 5.5% is substantially less than 7%, and is not compensatory and is not fair or reasonable. Petitioner further urges that a return of 5.5%, when the Utilities Commission found a 7% return necessary to maintain petitioner's "credit, and at the same time, be fair and reasonable", is not compensatory and is confiscatory. *West Ohio Gas Company* v. *Public Utilities Commission of Ohio, supra.*

Conclusion

For the above reasons we respectfully submit that writ of certiorari should be granted, the judgment and opinion of the court below as hereinabove specified reversed, and the cause remanded to the Utilities Commission with directions that petitioner's actual experience of revenues and expenses for the years 1949 and 1950 must be considered and taken into account in fixing definitive rates to be charged for gas.

Respectfully submitted,

ELLIOTT ADAMS,
423 Atlantic National Bank Building,
Jacksonville, Florida,
Counsel for Petitioner.

MCCARTHY, LANE & ADAMS,
423 Atlantic National Bank Building,
Jacksonville, Florida,
Of Counsel.

FILED
JUL 31 195
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 111

JACKSONVILLE GAS CORPORATION,
A Corporation Organized and Existing Under the Laws of the State of Florida . . Petitioner,

vs—

FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION . . . . . Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

LEWIS W. PETTEWAY
700 South Adams Street
Tallahassee, Florida
Counsel for Respondent

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	3
Question Presented	3
Statement	3
Argument	5
Conclusion	10

TABLE OF CASES

Page

Capterton vs. Ballard 14 Wall. 238; 20 L.Ed. 885 2

Gorman vs. Washington University, 62 S.Ct. 962; 86 L.Ed. 1300 2

Interstate Commerce Commission vs. Jersey City 322 US 503; 88 L.Ed. 1420 6

Memphis Natural Gas Co. vs. Beller 62 S.Ct. 857; 86 L.Ed. 1090 2

St. Joseph Stock Yards Co. vs. United States, 298 US 38-94; 80 L.Ed. 1033 5

Storrs vs. Pensacola & A. R. Co., 29 Fla. 617; 11 So. 226, at page 230 7

STATUTES

Chapter 8974, Laws of Florida, Acts of 1921 3

Section 1257, Title 28, U. S. Code 2

Supreme Court of the United States

OCTOBER TERM, 1951

No. 111

JACKSONVILLE GAS CORPORATION,
A Corporation Organized and Existing
Under the Laws of the State of Florida . . Petitioner,

vs—

FLORIDA RAILROAD AND PUBLIC
UTILITIES COMMISSION . . . . . Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

OPINIONS BELOW

The principal opinion and order of the Florida Railroad and Public Utilities Commission, Respondent herein, (R. 1-40) is reported in 82 PUR (NS) 67. The subsequent order dated March 29, 1950 is not reported but is correctly set forth in the transcript of record herein. (R. 13-18, Inc.) The opinion of the Supreme Court of Florida (R. 126-136) is reported in ..... Fla. .....; 50 So.(2d) 887.

JURISDICTION

It is apparent that jurisdiction of this Court is invoked by Petitioner under *Section 1257, Title 28, U.S. Code.*

The foregoing statute is the only authority for taking a case to the United States Supreme Court from the highest Court of a State and the right to review the decision of a state court exists only in cases strictly within its terms.

Caperton vs. Ballard 14 Wall. 238; 20 L.Ed. 885; Gorman vs. Washington University, 62 S.Ct. 962; 86 L.Ed. 1300.

The burden is upon Petitioner to show affirmatively that the United States Supreme Court has jurisdiction.

Memphis Natural Gas Co. vs. Beller 62 S.Ct., 857; 86 L.Ed. 1090.

We respectfully submit that it affirmatively appears that this Court does not have jurisdiction to review the foregoing decision of the Supreme Court of Florida by Writ of Certiorari because:

(A) It does not affirmatively appear that any federal treaty, statute, ground, question, right, or title is drawn in question and the validity thereof determined by the decision of said Court.

(B) It affirmatively appears that the sole question involved is the failure of the Respondent Commission and the State Supreme Court to give consideration to certain post-hearing developments in prescribing rates and charges for the sale of manufactured gas by Petitioner.

STATUTE INVOLVED

The only statute involved is *Chapter 8974, Laws of Florida, Acts of 1921,* and appears as Appendix "A" to this brief.

QUESTION PRESENTED

Where a state regulatory commission, on the basis of the record then before it, fixes rates to be charged in the future, and retroactively for the year in which the rate order is issued, should said rate order be quashed by the State Supreme Court because the Commission subsequently refused to vacate said rates and give consideration to actual sales for the current year which were lower than the Commission's estimates?

STATEMENT

The Jacksonville Gas Corporation, the Petitioner herein, is a public utility company incorporated under the laws of the State of Florida and owns and operates a manufactured gas plant and transmission and distribution system in the City of Jacksonville, Florida.

Chapter 8974, Laws of Florida, Acts of 1921, (Appendix "A") authorizes the City Commission of the City of Jacksonville to fix *just, reasonable, compensatory,* and *adequate* rates which may be charged for the sale of manufactured gas to consumers thereof in said City. This law also provides that any such gas utility may appeal from the action of the City Commission to the Florida Railroad and Public Utilities Commission, the Respondent herein.

On March 4, 1948, the City Commission of Jacksonville adopted a Resolution initiating an investigation of the rates

then being charged by Petitioner herein for manufactured gas distributed to consumers therof in said City. Thereafter, on October 14, 1948, the City Commission adopted a Resolution fixing the rates to be charged for manufactured gas within the City of Jacksonville on and after January 1, 1949. The rates therein fixed constituted a substantial reduction in the rates then being charged by Petitioner.

Jacksonville Gas Corporation being dissatisfied with the reduced rates, filed its bill of complaint in the United States District Court for the Southern District of Florida praying that the City Commission be enjoined from enforcing said reduced rates. A temporary injunction was granted pending final determination of an appeal to the Florida Railroad and Public Utilities Commission which appeal was perfected on December 9, 1948.

Under Chapter 8974, supra, the Florida Commission exercises a special statutory appellate jurisdiction with authority to decide the issues on the basis of the record made before the City Commission or to take further and additional testimony. In the exercise of said appellate jurisdiction said Commission is also authorized to set aside, modify, or approve the action of the City Commission or increase or reduce the rates involved in said appeal.

After a series of hearings at which additional testimony was heard, the State Commission entered its order on December 2, 1949 fixing rates somewhat higher than those prescribed by the City Commission but lower than those then in effect. On December 28, 1949 the gas corporation filed a petition with the State Commission requesting certain adjustments and corrections in the Commission's rate order.

A hearing was held on this petition for adjustments and corrections on February 8, 1950 and the gas corporation presented testimony concerning actual operations for the full year 1949 and requested that the rate order be changed to give effect to this new testimony. The Commission declined to change its order and the gas corporation attempted to have this latest order reviewed by the Supreme Court of Florida on certiorari. The Supreme Court of Florida declined to quash the Commission's order but left the matter for "such consideration as future rate-making bodies shall see fit to give it when next the determination of rates reaches them."

Jacksonville Gas Corporation now seeks by certiorari to have this Court review and quash the order of the Supreme Court of Florida.

ARGUMENT

It has been our experience during many years in the regulation of public utilities that it is a common practice in rate cases for utilities to seek rehearings for the purpose of bringing the record up to date and in the meanwhile stall the enforcement of an unfavorable administrative order. That is the situation in this case.

However, the courts have not approved this procedure. The late Mr. Justice Brandeis in *St. Joseph Stock Yards Co. v. United States, 298 US 38-94, 80 L.Ed. 1033,* quoted with approval the following statement made by the Secretary of Agriculture in a rate proceeding:

> "If rate regulation is to be effective, there must come at some time an end of hearings and a decision of the questions involved."

In discussing this matter of "bringing the record up to date and making adjustment for intervening circumstances" this Court in *Interstate Commerce Commission v. Jersey City, 322 US 503, 88 L.Ed. 1420* said:

> "Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consumated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of the reviewing body."

The court then went on to refer with approval to its decision in the *St. Joseph Stock Yards Case, supra,* which arose under the rate-making provisions of the *Packers and Stockyards Act.* In that case the Secretary of Agriculture denied a request to add three months' developments to the record. In approving the action of the Secretary the Court, speaking through Mr. Justice Roberts, said:

> "The amended petition was filed about three months after the original order issued. It is inconceivable that economic conditions had so altered in this brief period as to demonstrate that the new schedule of rates, if just when promulgated, had become unjust and oppressive. *The schedule should have been given a trial*

and any alteration or modification should have been asked in the light of more extensive experience. We are unable to find anything arbitrary or unreasonable in the denial of the petitions."

In denying the petition for corrections and adjustments herein, the Florida Commission among others things said:

"There is no actual experience available as to the results which would obtain were these rates put into effect. It is the opinion of the Commission that the gas company should put said rates into effect immediately and then after a reasonable time, if they should prove to be insufficient, the gas company, under the statute, can apply to the city commission of the City of Jacksonville for appropriate relief."

It is the law of Florida that where rates have been established by the railroad commissioners and the utility and the commissioners differ as to whether such rates, considered as a whole, will prove remunerative to the utility, and there is room for a difference of intelligent opinion on the question, the courts cannot interfere, or substitute their judgment for that of the commissioners, but the rates as fixed by the commissioners must, insofar as the courts are concerned, be left to the test of experiment. *Storrs v. Pensacola & A. R. Co., 29 Fla. 617, 11 So. 226, at page 230.*

There is one final phase of this matter we would like to discuss briefly and that is the Commission's estimate of the average gas sales for the years 1949 and 1950.

The City Commission advocated that the rates should be fixed on the basis of gas sales for the year 1948 of 961,655,000 cubic feet. However, it appeared that the gas sales for the first three months of 1949 were 101,792,000 cubic feet less than the gas sales for the same period in 1948;

46,406,000 cubic feet less than for the same period in 1946; and approximately 76,000,000 cubic feet less than for the first three months in 1945. The Commission felt that this sharp decline of gas sales in the early part of 1949 should be taken into consideration in making its estimates for the entire year 1949 and for 1950.

The general manager of the gas corporation estimated that gas sales for the year 1949 would be 822,361,000 cubic feet. The Commission estimated that the sales would be 900,273,000 cubic feet for 1949 and 926,871,000 for the year 1950. The method employed by the Commission in arriving at its estimates are set forth in detail in Paragraph VIII of the Commission's Order dated December 2, 1949. (R. 21-22).

At the hearing on the petition for corrections and adjustments the general manager for the gas corporation was asked the question: "Have you ever been able to estimate your send out (gas sales) closer than ten percent?" His answer was:

> "No, sir. Ten percent is a pretty close figure. If we had any way of knowing what the weather would be we could get it almost exactly but that is a guess. We subscribe to different services which attempt to forecast the weather but they have been very badly mistaken. It is purely an average what we have to go on." (Tr. p. 78.)

Another witness for Petitioner testified (Tr. p. 66) that actual sales for the year 1949 were 862,852,500 cubic feet. Simple mathematics will show that the gas corporation's estimate was 4.69 percent less than actual sales and the Commission's estimate was 4.34 percent more than actual

sales. This would appear to be a *very* close estimate in view of the testimony of the general manager that ten percent would be a "pretty close figure." Then too it will be observed that the Commission's estimate was .35 percent closer the actual figure than Petitioner's estimate.

Petitioner has taken the position that the Commission should not base its estimate on one year's sales. It would appear to us that the result of the estimate is the important consideration rather than the method employed in its development. However, the Commission's Order discloses that it did give consideration to gas sales for more than one year. In order to test the accuracy of the Commission's estimate let us measure it against the average for the four years 1946-1949, inclusive. 1949 sales were 862,852,500 cubic feet; 1948 sales 961,655,000; 1947 sales 995,190,000 and 1946 sales 896,133,000 or a total for the four years of 3,715,830,500. The average for the four years would be 928,957,625 cubic feet or 2.09 percent more than the Commission estimate for the year 1949 and only 1.71 percent more than the Commission's estimate of the average sales for the years 1949 and 1950.

It seems somewhat absurd to us for anyone to seriously argue that the Commission should be expected to arrive at closer estimates than it has in this case. The Commission's estimates were only 4.34 percent in excess of actual sales for the year 1949 and was only 2.09 percent less than the average for the four years 1946-1949 although the estimate was not arrived at by taking the average for any particular period but by giving consideration to every factor which had been presented to the Commission.

Frankly, we cannot take petitioner seriously when it contends that the Commission rates should be set aside simply

because they are based on estimated gas sales which exceeded actual sales by less than *five percent*. Who can say what caused the low sales volume? Perhaps it was the continued high rates which had been condemned both by the City Commission and by Respondent Commission. In its Order the Commission, based upon its vast experience in rate matters and the effect of rate changes, expressed its opinion that the sales volume probably would have increased had the lower rates been made effective throughout the year 1949. Certainly, the rates fixed by the Commission should be put into effect so that actual experience over a reasonable period could be obtained before any change is made in said rates.

CONCLUSION

Here we have a dissatisfied public utility seeking one more review by still another Court. This proceeding was initiated by the City Commission of Jacksonville in the early part of 1948, more than three years ago, and still the people WAIT FOR THE RELIEF which the City Commission, the State Commission and the State Supreme Court have said is their due. Surely there must come a time when hearings must cease and rates prescribed as a result of those hearings must become effective.

If the utility here is right, then it would not now be sufficient to consider actual operating results in 1949. Sales for 1950 and for 1951 would become a part of the proceeding and by the time the results for those years have been considered it would be necessary to give some thought to the year 1952. When would the regulatory body be able to say this is the end?

While the petitioner anxiously seeks a review by this

Court it has failed to make it appear that there are any special or important reasons for granting certiorari in this case. There is no conflict of decision, no important question of federal law involved and the decision below is clearly correct.

We respectfully submit that the petition should be denied because it does not affirmatively appear that any federal statute, ground, question, right or title is involved.

Respectfully submitted,

LEWIS W. PETTEWAY,
Counsel for Respondent.

APPENDIX A

CHAPTER 8974
LAWS OF FLORIDA
ACTS OF 1921

AN ACT Authorizing the City Commission of the City of Jacksonville to Fix the Price of Gas and to Regulate the Furnishing of Gas to Consumers in the City of Jacksonville, and Providing for an Appeal from the Order of the City Commission to the Railroad Commission of the State of Florida and giving Such Railroad Commission Jurisdiction Thereof.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

Section 1. That the City Commission of the City of Jacksonville is hereby authorized to fix just, reasonable compensatory and adequate rates which may be charged for gas to consumers thereof in the City of Jacksonville, and to make such reasonable rules and regulations in regard to the extensions of mains, connections and service to consumers as the City Commission may deem necessary and proper, and to prescribe penalties for failure to observe any rate so fixed, or for the violation of any rule or regulation that may be prescribed under this Act. Any action of the Commission under this Act shall be in the form of a resolution and shall be published sixty days before the same shall take effect, and shall have the same force as an ordinance. The penalties prescribed in this section shall be enforced in the Municipal Court.

Sec. 2. Any furnisher or producer of gas, who may be dissatisfied with any action taken by the City Commission,

under this Act, may appeal from the action of the City Commission to the Railroad Commission of the State of Florida. Such appeal may be taken within sixty days, and perfected by filing with the City Commission a petition setting forth the matter appealed from, and therein giving a full, true and correct statement of the proceeding had, and the relief desired, and within fifteen days after the filing of said petition, the clerk or other recording officer of the City Commission shall transmit to said Railroad Commission of the State, a true and correct transcript of all proceedings, including testimony or papers or data submitted had in, by and before said City Commission, dated and signed by the Chairman or acting Chairman of said Board of Commissioners and certified to as to its correctness by the clerk or other recording officer of said board, and the party taking the appeal is hereby required to pay all costs of said appeal.

Sec. 3. The said Railroad Commission of the State of Florida shall always be open for the purpose of this Act, and shall have and are hereby given jurisdiction to hear and determine the appeals herein provided for, and to that end may, if they deem the ends of justice so required, take further and additional testimony after reasonable notice given to parties in interest relevant to the questions submitted, and shall make its findings of fact upon which conclusions reached are based in the questions presented in the petition of the appellant, and shall enter an order or orders, setting aside, modifying, or approving the action of the City Commission appealed from or increase or reduce the rates appealed from with full power to invoke the use of the writ of mandamus or prohibition in the enforcement of its orders. But no appeal to the Railroad Commission shall operate to supersede the order of the City Com-

mission from which the appeal is taken until the final determination by the Railroad Commission of the question or the questions presented by the appeal.

Sec. 4. Any rate, rule or regulation which may be fixed or prescribed by the City Commission under the authority of this Act shall continue in force and effect continuously for a period of not less than two years from the date that said rate, rule, or regulation may be fixed, made or prescribed, unless same shall be changed or modified by the Railroad Commission on appeal as herein provided, or by a court of competent jurisdiction; and any producer of gas shall be entitled to appeal to the Railroad Commission in the manner and on the terms hereinbefore provided from any order of the City Commission modifying or changing any rate, rule, regulation or penalty theretofore fixed, made or prescribed by said City Commission.

Sec. 5. In the event the provisions of this Act relating to an appeal to the Railroad Commission, and giving the Railroad Commission appellant jurisdiction or any other power shall be adjudged invalid such invalid portion of the Act shall not affect the validity of the remainder of the Act.

Sec. 6. Should the provisions of this Act relating to an appeal to the Railroad Commission be held valid, then the order or orders of the Railroad Commission made in pursuance of this Act shall be conclusive and final until changed by the City Commission as hereinbefore provided, or vacated, or changed by a court of competent jurisdiction, but in the event of the provisions of this Act relating to an appeal to the Railroad Commission or conferring any other power upon said Railroad Commission are held to be in-

valid, then the rates, rules, regulations and penalties which may be made, fixed or prescribed by the City Commission under and in pursuance of Section 1 of this Act, shall be final and conclusive until vacated or changed by a court of competent jurisdiction, or by the City Commission as hereinbefore provided.

Sec. 7. It is intended that nothing in this Act contained shall be considered to oust or deprive the courts of any jurisdiction to hear and determine now vested in or procured by the courts of the land.

Sec. 8. Should any portion of this Act be held invalid or inoperative, then the remainder of this Act shall take effect.

Sec. 9. That all laws and parts of laws in conflict herewith are hereby repealed.

Sec. 10. This act shall take effect immediately upon its becoming a law.

Became a law without the approval of the Governor.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each such party as required by the Rules of Practice.

Dated at Tallahassee, Florida, this 30th day of July, 1951.

LEWIS W. PETTEWAY, of Counsel.

Office Supreme Court
FILED
AUG 20 19
CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 111

JACKSONVILLE GAS CORPORATION, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA,

Petitioner,

vs.

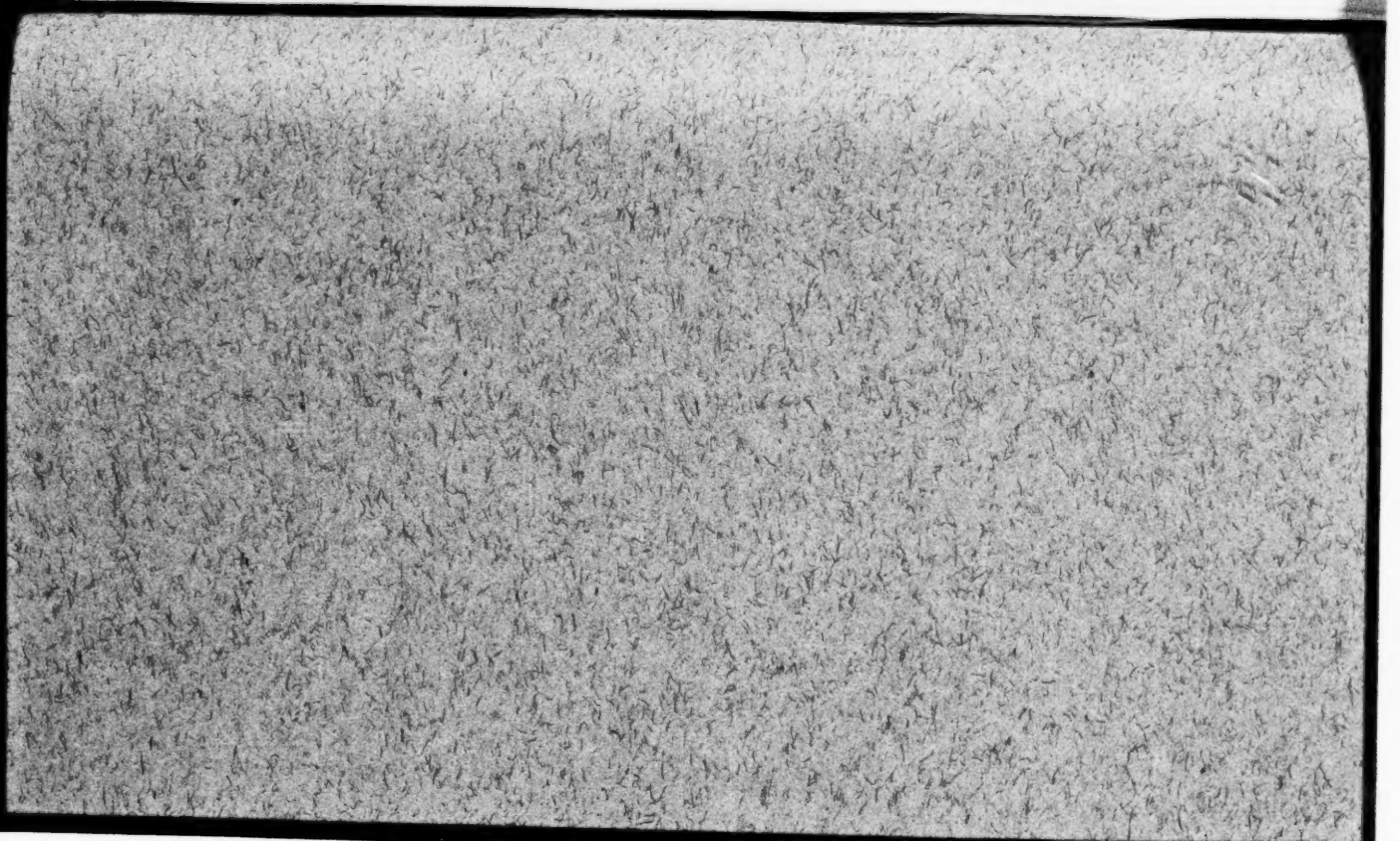
FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION,

Respondent

REPLY BRIEF OF PETITIONER

ELLIOTT ADAMS,
Counsel for Petitioner,
423 Atlantic National Bank Building,
Jacksonville, Florida.

MCCARTHY, LANE & ADAMS,
Of Counsel,
423 Atlantic National Bank Building,
Jacksonville, Florida.



AUTHORITIES CITED

Title and Citation	Page
Atchison, Topeka & Santa Fe R.R. Co. v. *U. S.*, 284 U. S. 248, 76 L. ed. 273	5
Interstate Commerce Commission v. *Jersey City*, 322 U. S. 503, 88 L. ed. 1420	2
Matthews v. *State ex rel. St. Andrews Bay Transportation Company*, 111 Fla. 587, 149 So. 648	6
St. Joseph Stock Yards Co. v. *U. S.*, 298 U. S. 38, 80 L. ed. 1033	2
Storrs v. *Pensacola & A. R. Co.*, 29 Fla. 617, 11 So. 226	2
West Ohio Gas Co. v. *Public Utilities Commission*, 294 U. S. 79, 79 L. ed. 773	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 111

JACKSONVILLE GAS CORPORATION, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA,

Petitioner,

vs.

FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION,

Respondent

REPLY BRIEF OF PETITIONER

Respondent has made two points in its brief in opposition to certiorari herein:

1) That there must be an end to rate fixing proceeding and that the respondent, Florida Railroad and Public Utilities Commission had discretionary authority to grant a rehearing or decline to reopen the case for a rehearing (pp. 5-7); and

2) That the Commission made a close guess on gas sales in its estimates for 1949-1950 (pp. 7-10).

Neither of these points have any bearing on the questions presented to this Court. It is true that respondent commission had discretionary authority to decline to reopen the rate case.

St. Joseph Stock Yards Co. v. *United States,* 298 U. S. 38, 80 L. Ed. 1033;

Interstate Commerce Commission v. *Jersey City,* 322 U. S. 503, 88 L. 5d. 1420;

Storrs v. *Pensacola & A. R. Co.,* 29 Fla. 617, 11 So. 226,

are sound authority for that proposition. But they are inappropriate to the case at bar.

The two Federal cases were cited by the city attorney in support of his objection to the taking of any new and additional testimony. They merely hold that it is a matter of sound discretion vested in an administrative board or agency whether or not, after it makes a rate order, to grant or deny a rehearing by re-opening the proceeding and hearing further testimony. In the *St. Joseph Stockyards Company* case, the Supreme Court affirmed the action of the Secretary of Agriculture in declining to give a *second* rehearing in the proceeding. (The Secretary had previously allowed *one* rehearing, 298 U. S., text p. 48). In the *Interstate Commerce Commission* case, the Supreme Court affirmed the Interstate Commerce Commission for denying a rehearing to the price administrator and the City of Jersey City. These two cases make it perfectly clear that the view of the U. S. Supreme Court in that hearings in administrative proceedings are not matters of right but are subject to the discretion of the administrative body.

In the case at bar, the Railroad Commission first entered its order No. 1571 on December 2, 1949. It made its order retroactive for the prior 11 months, that is to say, effective

from January 1, 1949 on. In making said order, the Commission made a number of estimates and forecasts concerning the Company's sales during the years 1949 and 1950, the Company's costs of fuels, the Company's taxes (other than Federal income taxes), the Company's rate-case expense, and the Company's depreciation, etc., etc. Just as soon as the Commission's order No. 1571, consisting of 34 pages of legal cap, could be examined and analyzed by us, we filed for the Company, with the Commission, a petition for adjustments and corrections to said order in order to correct the erroneous forecasts and estimates of the Commission in the light of actual experience of the Company for the calendar year 1949 to which the Commission's rates applied. On December 30, 1949, the Commission entered its order No. 1577 granting a further hearing and set the matter for hearing at Tallahassee on February 8, 1950, specifically ordering that jurisdiction of the subject-matter of the proceeding, and of the respective parties, be retained, and that its former order No. 1571 should not become final and effective until further order of the Commission. Moreover, on February 8, 1950, when the Commission reconvened, pursuant to its Order of December 30, 1949, the city attorney for the City of Jacksonville interposed an urgent objection "to reopening the record for the purpose of taking new and additional testimony" and argued and restated his motion repeatedly at pages 47-52 and 85-86 of the transcript of record.* The city attorney claimed that the case had "been closed," and urged that no further testimony be permitted, citing *St. Joseph Stockyards Company* v. *United States, supra,* and *Interstate Commerce Commission* v. *Jersey City, supra.* Before the Respondent Commission announced its ruling, Commission's counsel stated that he

---

* Page references are to pages of the printed record.

would like for the record to show his position on the question (R. 53):

> "The Supreme Court of Florida, in the case of *Matthews* v. *State ex rel. St. Andrews Bay Transportation Company,* 111 Fla. 587, 149 So. 648, said that every promulgated order of an administrative tribunal, such as the Railroad Commission, may be superseded by another order. Likewise, the Commission has the power to modify, and, indeed, *it is its duty to modify,* its pre-existing orders, when new evidence is presented which warrants a change.
>
> "In view of this decision of our Supreme Court, it is the position of Commission's counsel that the Commission should deny the objection of the City and proceed to hear the testimony under this petition for whatever weight it may be entitled to when the Commission arrives at its final decision."

The Commission ruled that "the objection of counsel for the City will be overruled and the Commission will proceed with the case."

Thereupon, the Commission heard testimony on February 8th and 9th, 1950, in support of the Petition for adjustments and corrections. On March 29, 1950, the Commission adhered to its original Order of December 2, 1949, and declined to modify the same in the light of the actual experience of the Company for the calendar year 1949 and the month of January, 1950, even though the rates fixed by the Commission covered that identical period.

Thus, it is apparent that the Commission *actually exercised the discretion vested in it* and granted the Company a rehearing and actually heard the Company's witnesses on February 8 and 9, 1950.

If, instead of granting the Company's petition for a further rehearing by its Order of December 30, 1949, the Commission had, in the exercise of its discretion, *denied* the

Company a further rehearing, then the law cited by counsel for the Commission, at pages 5-6 of his brief, to the effect that the granting of rehearings by administrative boards is discretionary with the board, would be applicable, and the question before this court would be whether or not the Commission had abused its descretion by denying the Company a rehearing. See for example, *Atchison, Topeka & Santa Fe R. R. Co.* v. *U. S.*, 284 U. S. 248, 76 L. Ed. 273, where the U. S. Supreme Court held that the Interstate Commerce Commission had abused its discretion in denying a rehearing on the ground that new facts coming to light pending the proceedings should be taken into consideration before the Commission's order was made finally effective.

But no such question is here presented, and the cases cited by counsel for the Commission are irrelevant. Here we have an entirely different situation. Here the Commission, by its order No. 1577 dated December 30, 1949, exercised its discretion, set the proceeding for further hearing February 8, 1950, took testimony February 8 and 9, 1950, and, on March 29, 1950, utterly disregarded the uncontradicted proof made February 8 and 9, 1950.

It should be remembered that the Commission's order of December 2, 1949, was retroactive to January 1, 1949, and set rates for the Company for the years 1949 and 1950 (and thereafter until such rates might be changed). In this case at the time of the rehearing February 8 and 9, 1950, the Company proved without contradiction the facts constituting its actual experience for the entire calendar year 1949 and for the month of January, 1950. Thus the Commission had before it *actual facts* without contradiction, covering many of the matters involved in the Commission's estimates and forecasts contained in its order of December 2, 1949. These are detailed at page 10 of our original brief.

The question here is, therefore, not one whether or not the Commission had discretion to *grant* or *deny* the rehear-

ing (it exercised its discretion and granted the rehearing). The question here is whether or not the Commission, in making rates for the Company for the year 1949, might lawfully disregard the actual experience of the Company for that year, *proved before it without contradiction,* and in pursuance of its order *granting* a rehearing, and continue to adhere to its prior erroneous estimates and forecasts.

The answer to that question is set forth in our original brief pp. 8-14.

The court held in *Matthews* v. *State ex rel.,* 114 Fla. 587, 149 So. 648, that it is the "*duty*" of the Commission "to modify its pre-existing orders where new evidence is presented which warrants a change."

Moreover, in *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 80, 79 L. Ed. 773, the Supreme Court held that the action of the Public Utilities Commission of Ohio, in disregarding the actual experience of West Ohio Gas Co. shown on rehearing, and in persisting in adherence to its former erroneous estimate and forecast, was "an arbitrary judgment" and a violation of the due process clause of the 14th Amendment, against which courts afford relief.

The third case cited by a counsel for the Commission in his brief, page 7, is *Storrs* v. *Pensacola A. R. Co.,* 29 Fla. 617, 11 So. 226. This case is accurately analyzed and stated by counsel for the Railroad Commission, but it is irrelevant to the case before this Court. In the *Storrs* case, the Railroad Commission had fixed railroad rates. There was "a difference of intelligent opinion" between the Commission and the Railroad Company as to whether or not the rates would prove remunerative, the Supreme Court of Florida held that such a difference of opinion must be left to the test of experience.

That, however, is not the case before this Court. Here, before the final order of the Commission, March 29, 1950,

the rates fixed by the Commission for the year 1949 and the first month of 1950 were *actually put to the test of experience and found wanting.*

In the instant case, the petition for certiorari herein (pp. 2-3) demonstrates the mistakes in the Commission's estimates and forecasts of revenues and expenses and proves them to be wrong in numerous particulars. The Commission, with uncontroverted facts before it, declined to correct its errors established by uncontradicted proof. It is to be noted that the Commission's brief, in arguing this point, does not controvert the fact that the estimates and forecasts contained in its order of December 2, 1949, were conclusively proved to be in error February 8 and 9, 1950, and that, in its order of March 29, 1950, it disregarded the facts and adhered to its erroneous forecasts and estimates.

So it is clear that the law cited by the Commission in its brief, pp. 5-7, is irrelevant, and that the cases cited in our brief, pp. 11-14, establish that the Commission's order is arbitrary and in violation of the 14th Amendment to the Constitution of the United States.

Respondent does not question the errors and mistakes in its estimates and forecasts of revenues and expenses. Respondent is content to attempt to justify one estimate, that of gas sales for the year 1949, by showing that its error was only 4.34 percent.

Not only does the Commission fail to justify any of its other erroneous estimates, but its argument wholly fails to meet the proposition that, before it made its order final on March 29, 1950, it had before it uncontradicted evidence of the Company's gas sales for the year 1949 and for the month of January, 1950, and that, with uncontradicted evidence placed before it February 8 and 9, 1950, it still ignored the facts, at a time when it was possible for

it to correct same, and when it was its legal duty to correct same, and it continued to adhere to its erroneous estimates, *not only of gas sales, but also of various underestimates of expenses.*

And so we say that the Commission's order of March 29, 1950 was arbitrary in disregarding uncontradicted facts duly proved at the hearings, February 8 and 9, 1950, which it specifically ordered to be held by its order of December 30, 1949, and has violated the due process clause of the Constitution of the United States.

> ***West Ohio Gas Company*** **v.** ***Public Utilities Commission*****, supra.**

We agree with respondent that there should be a time when a proceeding to fix rates for a public utility must come to an end. However, the conclusion of rate proceedings is not the primary result to be attained. The primary result to be attained is to fix a reasonable rate determined from the proven facts.

Respondent found and determined that petitioner is entitled to earn 7% (R. 31) on its depreciated investment of $2,973,903.60 (R. 30), or $208,173.25 (R. 25).

At the same time respondent prescribed retroactive rates which, because of errors in estimates and forecasts of revenues and expenses, would have provided a return for the year 1949 of $42,077.72 less than the $208,173.25 which the Respondent Commission found to be a reasonable earning (R. 68)!

Furthermore, petitioner's earnings for 1949 closely approximate the earnings found by the Respondent Commission to be reasonable, $12,618.23 (R. 111) or approximately .94% greater than the revenue necessary to give petitioner a fair return on its original dollar cost.

Conclusion

Petitioner respectfully submits that writ of certiorari should be granted herein; and that in the interest of an early, fair and just conclusion of this rate proceedings, this cause should be remanded to the Utilities Commission with directions that petitioner's actual experience for the years 1949 and 1950 must be considered and taken into account in fixing definitive rates to be charged for gas.

Respectfully submitted,

ELLIOTT ADAMS,
Counsel for Petitioner.

423 Atlantic National Bank Building
Jacksonville, Florida.

McCARTHY, LANE & ADAMS,
Of Counsel.

423 Atlantic National Bank Building
Jacksonville, Florida.